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6 UNITED STATES DISTRICT COURT
7 CENTRAL DISTRICT OF CALIFORNIA
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10 NATIONAL LABOR RELATIONS
11 BOARD, ON RELATION OF
AMERICAN APPAREL, INC.,

12 Applicant,

13 v.

14 DOV CHARNEY,

15 Respondent.
16

Case No. MC 16-0016-JAK (KK)

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE
JUDGE

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18 This Report and Recommendation is submitted to the Honorable John A.
19 Kronstadt, United States District Judge, pursuant to Title 28 of the United States
20 Code, section 636 and General Order 194 of the United States District Court for
21 the Central District of California.
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23 I.

24 **SUMMARY OF RECOMMENDATION**

25 This is an administrative subpoena enforcement proceeding relating to an
26 action before the National Labor Relations Board (“NLRB”) on an election
27 petition seeking certification of a labor union. On February 4, 2016, the NLRB
28 filed an Application for an Order Requiring Compliance with Administrative

1 Subpoena Duces Tecum pursuant to Title 29 of the United States Code, section
2 161 (“Application”) issued to Respondent Dov Charney (“Charney”). ECF
3 Docket No. (“dkt.”) 1, App. For the reasons set forth below, the Court
4 recommends granting the Application in its entirety.

5 6 II.

7 BACKGROUND

8 On November 12, 2015, the General Brotherhood of Workers of American
9 Apparel (“GBWAA”) filed an election petition against American Apparel
10 requesting certification as a labor union and alleging American Apparel declined
11 recognition of GBWAA on August 27, 2015. Ex. 1.¹ On November 13, 2015, the
12 NLRB served a Notice of Representation Hearing, setting a hearing on the petition
13 for November 23, 2015. Ex. 2.

14 On November 18, 2015, American Apparel served a Subpoena Duces Tecum
15 B-1-P6SO5T (“Subpoena”) on Charney, American Apparel’s former CEO. App.
16 at ¶ 6; Ex. 4; Opp. at 2-3; Ex. 5. The Subpoena seeks (1) Charney’s
17 correspondence with the president of the GBWAA and four other individuals
18 previously or presently involved with the GBWAA; (2) records relating to any
19 money Charney paid or loaned to the GBWAA, or organizations allegedly related
20 to the GBWAA; and (3) copies of applications for business licenses that Charney
21 caused to be filed from January 1, 2015 to the present. Ex. 4; Dkt. 4, NLRB
22 Memorandum of Points and Authorities (“Mem.”) at 2-3. On November 20,
23 2015, Charney filed a Petition to Revoke the Subpoena with the NLRB, objecting to
24 the Subpoena on the grounds of (a) relevance, (b) that the Subpoena is overbroad
25 and unduly burdensome, (c) attorney-client privilege and/or attorney work
26 product, and (d) invasion of privacy. Ex. 5.

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¹ Exhibit numbers refer to the Exhibits attached to the Application.

1 On November 20, 2015, American Apparel filed a Statement of Position
2 alleging (1) GBWAA is not a labor organization under the Act; and (2) the
3 involvement of Charney in the GBWAA creates such a conflict of interest that the
4 GBWAA cannot be certified. Ex. 3. On November 23, 2015, American Apparel
5 filed an Answer to the Petition to Revoke the Subpoena. Ex 6.

6 On November 23 and 24, 2015, Charney failed to appear at the NLRB
7 hearings. Ex. 7.

8 On November 30, 2015, Charney's counsel appeared at the NLRB hearing
9 on his behalf. Ex. 8. At the hearing, the hearing officer declined to enforce the
10 Subpoena at that time, finding there was sufficient information in the record. Id.
11 The hearing officer then closed the hearing and referred the matter to the Regional
12 Director for decision. Id.; Ex. 9. However, on December 28, 2015, the Regional
13 Director, in a written decision, reopened the hearing for the purpose of
14 reconsidering American Apparel's request to enforce the Subpoena, finding the
15 additional information sought in the Subpoena would be useful in rendering a
16 decision on (1) GBWAA's status as a Section 2(5) labor organization, and (2)
17 whether certification of GBWAA would give rise to a conflict of interest. Ex. 9.

18 At the reopened hearing on January 11, 2016, the hearing officer denied the
19 Petition to Revoke and ordered Charney to appear and produce documents
20 pursuant to the Subpoena on January 12, 2016. Ex. 10.

21 On January 12, 2016, Charney failed to appear or produce documents and
22 the NLRB agreed to pursue enforcement of the Subpoena. Ex. 11.

23 On February 4, 2016, the NLRB filed the instant Application. Dkt. 1, App.
24 On March 8, 2016, Charney filed an Opposition. Dkt. 15, Opp. On March 15,
25 2016, American Apparel filed a Reply. Dkt. 16, Reply. The Court finds the matter
26 appropriate for decision without oral argument.

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1 **III.**

2 **LEGAL STANDARD**

3 The Ninth Circuit has explained that “[t]he scope of [a court’s] inquiry in an
4 agency subpoena enforcement proceeding is narrow.” NLRB v. North Bay
5 Plumbing, Inc., 102 F.3d 1005, 1007 (9th Cir. 1996); see U.S. v. Golden Valley
6 Elec. Ass’n, 689 F.3d 1102, 1113 (9th Cir. 2012). In such a proceeding, the Court
7 considers three questions: “(1) whether Congress has granted the authority to
8 investigate; (2) whether procedural requirements have been followed; and (3)
9 whether the evidence is relevant and material to the investigation.” Golden Valley
10 Ass’n, 689 F.3d at 1113. If these three questions are answered in the affirmative,
11 the subpoena must be enforced unless the opposing party shows that the subpoena
12 is overbroad or unduly burdensome. North Bay Plumbing, Inc., 102 F.3d at 1007.

13 **IV.**

14 **DISCUSSION**

15 **A. THE NLRB HAS AUTHORITY TO INVESTIGATE**

16 The NLRB has the statutory authority to issue subpoenas requiring the
17 production of evidence and testimony during the investigatory stages of an unfair
18 labor practice proceeding. See 29 U.S.C. § 161(1); North Bay Plumbing, Inc., 102
19 F.3d at 1008. District Courts can enforce NLRB subpoenas pursuant to Title 29 of
20 the United States Code section 161, subdivision (2) (“Section 161(2)”).²

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22 ² Section 161(2) provides as follows:

23 In case of contumacy or refusal to obey a subpoena issued to any
24 person, any district court of the United States or the United States
25 courts of any Territory or possession, within the jurisdiction of which
26 the inquiry is carried on or within the jurisdiction of which said person
27 guilty of contumacy or refusal to obey is found or resides or transacts
28 business, upon application by the Board shall have jurisdiction to issue
to such person an order requiring such person to appear before the
Board, its member, agent, or agency, there to produce evidence if so
ordered, or there to give testimony touching the matter under
investigation or in question; and any failure to obey such order of the
court may be punished by said court as a contempt thereof.

1 Accordingly, the Court finds the NLRB had statutory authority to issue the
2 Subpoena in connection with its investigation into the GBWAA election petition.

3 **B. THE NLRB SATISFIED PROCEDURAL REQUIREMENTS**

4 Section 102.31 of the NLRB's Rules and Regulations provides general
5 procedures for the issuance of subpoenas and petitions to revoke subpoenas. See
6 29 C.F.R. § 102.31; North Bay Plumbing, Inc., 102 F.3d at 1008. Charney does not
7 contend these procedures were not followed. See Opp. Rather, Charney identifies
8 alleged violations of the NLRB Case Handling Manual and objects to enforcement
9 of the Subpoena on the following grounds: (a) personal appearance is not allowed at
10 the pre-complaint phase; (b) the Subpoena does not compel testimony because it is
11 not captioned as a subpoena *ad testificandum*; and (c) the Subpoena lacks specificity
12 due to the use of the word "all." Opp. at 6-8.

13 Charney's arguments are meritless. First, Section 102.31 of the NLRB's
14 Rules and Regulations and Title 29 of the United States Code, section 161(1)
15 ("Section 161(1)") expressly allow for pre-complaint subpoenas compelling
16 testimony. 29 C.F.R. § 102.31(a); 29 U.S.C. § 161(1); North Bay Plumbing, Inc.,
17 102 F.3d at 1008. Second, the Subpoena is clear on its face that it is intended to
18 compel both testimony and production of documents. See Ex. 4. Third, to the
19 extent the information sought in the Subpoena is relevant and not overly broad as
20 discussed below, there is no regulation *per se* prohibiting the use of the word "all"
21 to describe documents sought in a subpoena.

22 Accordingly, the Court finds the NLRB satisfied all applicable procedural
23 requirements in seeking to enforce the Subpoena.

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28 29 U.S.C. § 161(2).

C. THE INFORMATION SOUGHT IN THE SUBPOENA IS RELEVANT

The NLRB must show “only some reasonable basis for believing that the information will prove relevant.” NLRB v. Int’l Medication Sys., Inc., 640 F.2d 1110, 1114 n.3 (9th Cir. 1981); see also EEOC v. Children’s Hospital Med. Ctr. of Northern California, 719 F.2d 1426, 1429 (9th Cir. 1983) (en banc) (“When . . . ‘[t]he evidence sought by the subpoena was not plainly incompetent or irrelevant to any lawful purpose,’ it should have been enforced.”) (quoting Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 509, 63 S. Ct. 339, 87 L. Ed. 424 (1943)). A district court defers to “the agency’s appraisal of relevancy, which must be accepted so long as it is not obviously wrong.” N.L.R.B. v. Am. Med. Response, Inc., 438 F.3d 188, 193 (2d Cir. 2006); F.D.I.C. v. Garner, 126 F.3d 1138, 1143 (9th Cir. 1997) (citing the Second Circuit standard approvingly).

Here, the Subpoena seeks (1) communications between Charney and five named individuals from the date Charney was suspended as CEO of American Apparel to the present, regarding American Apparel, Hermandad Mexicana, “TeamDov,” “Workers United to Save American Apparel,” or the GBWAA;³ (2) documents evidencing Charney’s financial support of Hermandad Mexicana, “TeamDov,” “Workers United to Save American Apparel,” or the GBWAA from the date Charney was suspended as CEO of American Apparel to the present; and (3) applications for business licenses Charney filed from January 1, 2015 to the present.

The Regional Director determined the documents and testimony sought would assist her in determining the issues presented in the election petition. See Ex. 9. Charney does not dispute the relevance of the information sought; rather, he

³ American Apparel alleges, and Charney does not dispute, that Hermandad Mexicana, “TeamDov,” “Workers United to Save American Apparel,” are affiliated with GBWAA. See Opp.; Reply at 2.

1 argues the information is merely cumulative. Opp. at 9. Because the NLRB's
2 appraisal of relevancy is "not obviously wrong," the Court defers to the agency's
3 finding. See Am. Med. Response, Inc., 438 F.3d at 193; Garner, 126 F.3d at 1143.
4 Accordingly, the Court finds the information sought is relevant to establishing
5 Charney's involvement with the GBWAA and whether there exists a conflict of
6 interest.

7 **D. THE SUBPOENA IS NOT OVERBROAD OR UNDULY**
8 **BURDENSOME**

9 Finally, Charney argues the Subpoena is overbroad because the NLRB does
10 not need the information because "it is unlikely that the [NLRB] will change its
11 inclination regarding whether a complaint should issue." Opp. at 9. This
12 argument is non-sensical. Despite the hearing officer's initial determination the
13 additional information was not necessary, the Regional Director determined it
14 would be helpful in rendering her decision. As discussed above, the Court finds the
15 information sought is relevant to determining the issues presented by the election
16 petition. Charney does not point to any categories of information sought in the
17 Subpoena that would not be relevant to the issue of certification. Hence, the
18 Subpoena is not overbroad.

19 Charney next makes various arguments challenging the Subpoena, which the
20 Court finds meritless. First, Charney conclusorily argues enforcing the Subpoena
21 would violate his privacy. This argument has been squarely rejected by the Ninth
22 Circuit in North Bay Plumbing, which considered the argument that certain
23 subpoenas violated "state privacy laws" and rejected it because "investigations for
24 federal purposes may not be prevented by matters depending upon state law."
25 North Bay Plumbing, Inc., 102 F.3d at 1009. Moreover, even if state law were
26 applicable, Charney points to no compelling private information that would be
27 disclosed. Nor does Charney point to any applicable federal privacy laws.

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1 Second, Charney argues requiring him to produce the business applications
2 “would force him to reveal sensitive proprietary information and confidential
3 details about his business affairs.” Opp. at 9-10. However, the Subpoena only
4 seeks the applications that have already been filed with the State of California. Ex.
5 4. Therefore, there do not appear to be relevant privacy concerns.

6 Third, Charney argues American Apparel is improperly seeking to obtain
7 information about various other lawsuits filed by Charney against American
8 Apparel and requests a protective order limiting disclosure to the NLRB. Opp. at
9 10-11. Contrary to Charney’s claim, the Subpoena does not seek “to obtain
10 testimony from Charney about *anything* related to American Apparel.” See Opp.
11 at 11. The Court finds a protective order limiting disclosure to the NLRB is not
12 appropriate, because it would prevent American Apparel from litigating the action.
13 Moreover, Charney cites to no authority for his position that the NLRB and
14 American Apparel should not have access to relevant information necessary to
15 determine the case at hand.

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V.

RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the District Court issue an order: (1) accepting the findings and recommendations in this Report; (2) GRANTING the NLRB's Application; and (3) ordering Charney to appear before the NLRB to produce the subpoenaed documents described therein, and answer questions related to the matters under investigation as described in the Subpoena Duces Tecum B-1-P6SO5T.⁴

Dated: March 24, 2016



HONORABLE KENLY KIYA KATO
United States Magistrate Judge

⁴ Charney appears to have abandoned his claim of attorney-client privilege and attorney work product by failing to raise the objection in the Opposition. To the extent Charney maintains production of certain documents would violate his attorney-client privilege or his attorney's work product, Charney shall produce a privilege log and be prepared to produce the disputed documents to the NLRB hearing officer for in camera review.